WESTERN SLOPE GAS CO.

IBLA 75-246 Decided July 14, 1975

Appeal from a decision of the Colorado State Office, Bureau of Land Management, requiring a five-year rental payment of $4,155.00 for a gas pipeline right-of-way, C-1533-R/W.

Affirmed as modified.

1. Appraisals -- Rights-of-Way: Generally -- Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Applications

   Where an appraisal has followed established criteria in calculating the fair market value of rental for a right-of-way, it will be affirmed, absent a showing by positive and substantial evidence that the appraisal is in error.

APPEARANCES: John M. Hassoldt, Vice President and General Manager, Western Slope Gas Co., for the appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Western Slope Gas Company has appealed from a decision of the Colorado State Office, Bureau of Land Management, dated November 14, 1974, requiring a five-year rental payment of $4,155.00 for its gas pipeline right-of-way, C-1533-R/W.

The decision of November 14, 1974, was rendered pursuant to a remand by this Board of an earlier State Office decision, dated May 31, 1972, requiring payment of $4,510.00 as advance rental for the gas pipeline. See Western Slope Gas Company, 10 IBLA 345 (1973). In that decision this Board noted that:

> Examination of the case file discloses that the Bureau appraiser did not use the percentage of rights conveyed as set out in Instruction Memorandum DSC 70-15 of March 15, 1970, in his calculations of the rental value of the right-of-way. The record also indicated that the Bureau appraiser apparently did not consider many of the comparable sales set forth in the Martin report.

Id. at 346.

Pursuant to that decision, the State Office caused a new appraisal of the subject right-of-way to be undertaken. That appraisal resulted in a determination that the five-year rental should be $4,155.00. From that decision Western Slope Gas Co. has pursued this appeal.

[1] In order to delineate the scope of our decision herein it is necessary to describe in some detail the methods utilized in both the original appraisal and the appraisal resulting from our remand decision.

The original appraisal, made in 1972, was based on the market data approach, which uses the sale of similar sized tracts of land in the vicinity of the subject land to achieve a value for that land. The appraiser studied three sales and related them to the land involved in the right-of-way, which consists of two discrete units. He determined that the value of the land in Unit 1 (2.7 acres) was $4,800 per acre, and in Unit 2 (2.5 acres) the land was worth $2,000 per acre. He employed as the percentage of rights conveyed the figure of 75%. Using the formula $A = v * {}^{i}/_{1+i}$ where A is the Annual Rent, v the value of rights conveyed and i the interest rate (8 1/2%) the annual rental was computed to be $760 for Unit 1, and $295 for Unit 2. Thus, the total annual rental was $1,055. The lump sum payment for the five-year period paid in advance was determined to be $4,510.

In its original appeal Western Slope Gas Co. submitted the report of an independent appraiser, one William Martin. Martin also employed the market data approach in computing the fair market value of the right-of-way. His valuation, however, differed greatly from that arrived at by the State Office. As regards Unit 1, the Martin report made use of five sales and then examined three different sales to determine the value of Unit 2. He found a per acre value of $2,000 for Unit 1 and $500 per acre for Unit 2.

Furthermore, the Martin appraisal employed a 40% figure for the percentage of rights conveyed. Thus, the five year advance rental was estimated at $900, some $3,600 less than the State Office appraisal.

In Western Slope Gas Co., supra, we noted that it did not appear that the Bureau of Land Management appraisal had considered a number of the sales adverted to in the Martin appraisal and furthermore that Instruction Memorandum DSC 70-15, March 15, 1970, provided that the percentage of rights conveyed for overhead and subsurface linear rights-of-way was a flat 40%. Thus, we felt obliged to order a re-computation of the five-year rental.

The reappraisal, which was approved on October 9, 1974, also utilized the market data approach. The market data assembled in this reappraisal was much more detailed than that which had been collected for the original appraisal. Unit 1 was assessed at $3,000 per acre, whereas Unit 2 was valued at $500 per acre. We believe the valuation of the acreage involved is substantially supported by the record and that the appellant has failed to show by positive evidence that it is in error. Cf. Western Arizona CATV, 15 IBLA 259 (1974).

The reappraisal computed the percentage of rights conveyed by subtracting from the fee value for Unit 1 and 2, $8,100 and $1,250 respectively, the value that would remain after the imposition of the easement. In each case it was determined that the only remaining value to the Government would be use of the land for grazing, which was valued at $200 per acre. As a result, it was determined that 93.5% of the value of Unit 1, and 60% of the value of Unit 2 was properly assessed for the pipeline easement. It is, of course, obvious that the percentage of rights conveyed in the reappraisal is not only greater than the 40% set out in Instruction Memorandum DSC 70-15, but exceeds as well the 75% figure used in the original appraisal as it related to Unit 1. Nevertheless, we find the imposition of such percentage figures justifiable.

In the first place, DSC 70-15 was amended by an order of the State Director, Colorado, on August 17, 1972. That order provided that "I.M. DSC 70-15 is herewith amended to provide that effective immediately 95% of the rights conveyed for subsurface and/or overhead lines, such as pipelines, buried cable, and/or powerlines, etc., shall be used for all lineal rights of way across public lands where the Highest and Best Use is Commercial/Recreational and/or Residential Subdivisions, or other high value land uses

other than grazing. The rationale involved here is that an overhead or subsurface right of way would effectively preclude any building use across subdivision-type land subject to the rights of the original right of way grantee." In our original decision we were concerned with the fact that there had been no justification for what appeared on the record to be an arbitrary variance with the Instruction Memorandum. The present posture of the case, however, differs markedly from that situation. We can conceive no more equitable way to determine the percentage of rights conveyed than by comparing the value of the land both before and after the easement has been granted. It may be that in a given situation opinions may vary as to the values used in such an analysis. But it is the duty of the appellant to show by clear and precise evidence that a value determination of the State Office is in error. This it has not done here. Therefore, we affirm the percentage of rights conveyed determinations utilized in the instant case.

After analyzing the reappraisal in the course of this appeal, we were somewhat perplexed by two items. First of all, whereas annual rental had been computed using the formula $A = v * {}^{i}/_{1+i}$ in both the original appraisal and that of Martin, the reappraisal determined the annual rental merely by adding the interest rate (8 1/2%) to a management fee of 1.5% to reach a rental fee of 10%. Additionally, there was no discount for the present payment of future rent. Accordingly, by Memorandum of April 16, 1975, the State Director, Colorado, was requested to provide any information he might have bearing on these two questions. He, in turn, referred this request to the Chief, Division of Appraisal, Bureau of Land Management. By memorandum of June 18, 1975, the Chief, Division of Appraisal, informed the Board that in his opinion there was insufficient justification in the instant case for either the imposition of the 1.5% management fee, or the failure to discount future rent. He recommended a recalculation of the rent as follows: Unit 1 - annual rent of $592, lump sum rental for five years of $2,333; Unit 2 - annual rent of $59, lump sum rental for five years of $232. Total rental for both units, $2,565. We find ourselves in agreement with these recommendations, and hereby modify the decision below to conform thereto.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Douglas E. Henriques
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Edward W. Stuebing
Administrative Judge